86 1895

No. 86-1679

Supreme Court, U.S.
FILED
MAY 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

SYLVIA AVERBACH,

Respondent,

v.

RIVAL MANUFACTURING COMPANY,

Cross-Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WILLIAM T. CAMPBELL, JR.
Counsel of Record
ROBERT B. MULHERN, JR.
SWARTZ, CAMPBELL & DETWEILER
1700 Land Title Building
100 South Broad Street
Philadelphia, PA 19110
(215) 564-5190

Attorneys for Cross-Petitioner Rival Manufacturing Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

1510

QUESTION PRESENTED

Whether an independent action under Federal Rule of Civil Procedure 60(b) to relieve a party from judgment because of another party's alleged fraud requires averments showing more than the fraud for which a Motion for New Trial under Federal Rule of Civil Procedure 60(b)(3) will be granted, and, if so, whether averments of facts showing extrinsic- fraud must be made in order to state a claim upon which relief can be granted.

RULE 28.1 LIST

The Cross-Petitioner incorporates by reference the "Rule 28.1 List" set forth in its brief in response to the Petition for Writ of Certiorari.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 28.1 LIST	ii
OPINIONS BELOW	2
JURISDICTION	2
RULE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING CROSS-PETITION	4
CONCLUSION	8

TABLE OF AUTHORITIES

CASES: Page

Bandai America, Inc. v. Bally Midway Mfg. Co., 775 F.2d 70 (1985), cert. denied 106 S.Ct. 1265 (1986) 6

Dowdy v. Hawfield, 189 F.2d 637 (D.C. Cir. 1951), cert. denied 342 U.S. 830, 72 S.Ct. 54, 96 L.Ed. 628 (1951) 5

Great Coastal Express, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 675 F.2d 1349 (4th Cir. 1982), cert. denied 459 U.S. 1128, 103 S.Ct. 764, 74 L.Ed.2d 978 (1983) 6

Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944) 6

Josserand v. Taylor, 159 F.2d 249 (C.C.P.A. 1946) 6

Lockwood v. Bowles, 46 F.R.D. 625 (D.C.D.C. 1969) 5

Marshall v. Holmes, 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870 (1891) 3, 5, 6

Publicker v. Shallcross, 106 F.2d 949 (3d Cir. 1939), cert. denied 308 U.S. 624, 60 S.Ct. 379, 84 L.Ed. 521 (1940) 6, 7

Serzysko v. Chase Manhattan Bank, 461 F.2d 699 (2d Cir. 1972), cert. denied 409 U.S. 883, 93 S.Ct. 173, 34 L.Ed.2d 139 (1972) 5

Travelers Indemnity Co. v. Gore, 761 F.2d 1549 (11th Cir. 1985) 5

United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93 (1878) 3, 4, 5, 6, 7

Wood v. McEwen, 644 F.2d 797 (9th Cir. 1981), cert. denied 455 U.S. 942, 102 S.Ct. 1437, 71 L.Ed.2d 654 (1982) 5

TABLE OF AUTHORITIES—Continued

Page

RULES:

Supreme Court Rule 19.5 2

Fed. R. Civ. P. 60(b) 2, 4, 7

Fed. R. Civ. P. 60(b)(3) 4, 7

TREATISES:

7 *Moore's Federal Practice*, ¶ 60.37[1] (1985 & Supp. 1986-87) 7

11 C. Wright & Miller, *Federal Practice and Procedure*, § 2868 (1973 & Supp. 1986) 7

No. 86-1679

In The

Supreme Court of the United States

October Term, 1986

SYLVIA AVERBACH,

Respondent,

v.

RIVAL MANUFACTURING COMPANY,

Cross-Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Cross-petitioner, Rival Manufacturing Company, respectfully prays that a Writ of Certiorari be issued to review the Opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled action on January 20, 1987 concerning the petitioner's fraud count.

OPINIONS BELOW

The cross-petitioner incorporates by reference the "Opinions Below" section of its brief in response to the Petition for Writ of Certiorari.

———o———

JURISDICTION

The cross-petitioner incorporates by reference the "Jurisdiction" section of its brief in response to the Petition for Writ of Certiorari.

This Cross-Petition is filed pursuant to Supreme Court Rule 19.5; the Petition for Writ of Certiorari was received on April 23, 1987.

———o———

RULE INVOLVED

Federal Rule of Civil Procedure 60(b).

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective ap-

plication; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdithis subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

———o———

STATEMENT OF THE CASE

The cross-petitioner incorporates by reference the "Statement of the Case" section in its brief in response to the Petition for Writ of Certiorari.

In reversing the District Court's dismissal of Averbach's fraud count, the Court of Appeals for the Third Circuit recognized that some courts have concluded that, if relief from a judgment is sought by an independent action, the distinction between "extrinsic" and "intrinsic" fraud persists. The Third Circuit held that that distinction, which was based on a statement in *United States v. Throckmorton,* 98 U.S. 61, 25 L.Ed. 93 (1878), was overruled, if it was ever the law, by *Marshall v. Holmes,* 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870 (1891). It further held that the distinction was rejected by the Third Circuit.

The Third Circuit also concluded that the elements of a cause of action for relief from judgment under the savings clause of Rule 60(b) are not different from the elements of a Rule 60(b)(3) Motion for New Trial based on fraud.

REASONS FOR GRANTING CROSS-PETITION

There is a conflict among the Courts of Appeals as to whether extrinsic fraud must be alleged in order to state a claim upon which relief can be granted in an independent action under Federal Rule of Civil Procedure 60(b) for relief from judgment and as to whether the elements of such cause of action are different from those in a Motion for New Trial based upon fraud under Rule 60(b)(3).

Because Averbach's Motion for New Trial under Rule 60(b)(3) was held to be time-barred, Averbach filed an independent action under the first savings clause of Rule 60(b), which provides that "[t]his rule does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, . . ."[1] The leading case with respect to an independent action to relieve a party from judgment, order or proceeding based upon fraud is *United States v. Throckmorton,* 98 U.S. 61, 25 L.Ed. 93 (1878), where the Supreme Court held that the

1. The second savings clause is not applicable because Averbach was not a defendant in the products liability action. The third savings clause is not applicable because it is well settled that an alleged failure to answer Interrogatories accurately does not amount to fraud upon the court.

fraud must be "... extrinsic or collateral, to the matter tried by the first court, and not ... a fraud in the matter on which the decree was rendered." *Id.*, 98 U.S. at 68. While the validity of this approach requiring extrinsic fraud has been questioned by some courts in view of the holding of *Marshall v. Holmes,* 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870 (1891), where the Supreme Court did not rely upon the "extrinsic/intrinsic" language, the Supreme Court has never overruled *Throckmorton* or otherwise indicated that it is not applicable. Many federal courts have followed the requirements set forth in *Throckmorton. Travelers Indemnity Co. v. Gore,* 761 F.2d 1549 (11th Cir. 1985) ("Perjury is an intrinsic fraud which will not support relief from judgment through an independent action." *Id.* at 1552); *Wood v. McEwen,* 644 F.2d 797 (9th Cir. 1981), cert. denied 455 U.S. 942, 102 S.Ct. 1437, 71 L.Ed.2d 654 (1982) ("Rule 60(b) also provides that a Court may consider an independent action to set aside a judgment for fraud on the Court. Although there is no time limit for these actions, they may be maintained only for extrinsic fraud." *Id.* at 801); *Serzysko v. Chase Manhattan Bank,* 461 F.2d 699 (2d Cir. 1972), cert. denied 409 U.S. 883, 93 S.Ct. 173, 34 L.Ed.2d 139 (1972) ("... to the extent that appellant has attempted to institute an independent action to set aside the original judgment, his papers present no basis for finding of fraud *inter partes.* Such an independent action has traditionally been sustainable only in cases of extrinsic, as opposed to intrinsic, fraud, . . ., and perjury by trial witnesses is recognized to be of the latter variety, ..." *Id.* at 702 (citations and footnote omitted)); *Dowdy v. Hawfield,* 189 F.2d 637 (D.C. Cir. 1951), cert. denied, 342 U.S. 830, 72 S.Ct. 54, 96 L.Ed. 628 (1951); *Lockwood v. Bowles,* 46 F.R.D. 625 (D.C.D.C. 1969); *see*

also Great Coastal Express, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 675 F.2d 1349 (4th Cir. 1982), cert. denied 459 U.S. 1128, 103 S.Ct. 764, 74 L.Ed.2d 978 (1983).

The Third Circuit's position is in opposition to the opinions referred to in the previous paragraph, as it stated in 1939 that *Throckmorton* is not " . . . the law of the Supreme Court today." *Publicker v. Shallcross,* 106 F.2d 949, 950 (3d Cir. 1939), cert. denied, 308 U.S. 624, 60 S.Ct. 379, 84 L.Ed. 521 (1940); *see also Bandai America, Inc. v. Bally Midway Mfg. Co.,* 775 F.2d 70 (1985), cert. denied 106 S.Ct. 1265 (1986). The decision in *Publicker* was strongly criticized by the Court of Customs and Patent Appeals in *Josserand v. Taylor,* 159 F.2d 249 (C.C.P.A. 1946), with the Court noting that the Supreme Court had applied the rule of *Throckmorton* after issuing its opinion in *Marshall* and that it would have "expressly repudiated the rule" in its Opinion in *Hazel-Atlas Glass Co. v. Hartford Empire Co.,* 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944), if it was of the opinion that intrinsic fraud would be sufficient for an independent action for relief from judgment. *Josserand v. Taylor,* 159 F.2d 249, 255 (C.C.P.A. 1946).

Finally, there is a difference of opinion among the leading commentators on the Federal Rules of Civil Procedure as to the applicability of the "extrinsic/intrinsic" fraud distinction. Wright and Miller have stated that

> [the distinction] is most unfortunate, if true. The distinction rests on clouded and confused authorities, its soundness as a matter of policy is very doubtful,

> and it is extremely difficult to apply. It ought not to persist as a limit on independent actions now that it has been abolished on motions.

11 C. Wright & Miller, *Federal Practice and Procedure*, § 2868, at 240-41 (1973 & Supp. 1986) (footnotes omitted). However, it is stated in *Moore's Federal Practice*, that " . . . the federal cases generally adhere, at least in statement, to the *Throckmorton* dicotomy of extrinsic and intrinsic fraud." 7 *Moore's Federal Practice* ¶ 60.37[1], at 619 (1985 & Supp. 1986-87) (footnote omitted).

In its Opinion supporting its reversal of the District Court's dismissal of the fraud count, the Third Circuit also held that the elements of a cause of action for relief from judgment under the savings clause of Rule 60(b) are not different from those elements in a Motion for New Trial on the basis of fraud under Rule 60(b)(3). The District Court had held that, unless something more was required in independent actions based on fraud commenced more than one year after judgment, the one year limitation of Rule 60(b)(3) relief would be seriously compromised. The Third Circuit relied upon its view of the procedural history of Rule 60(b) to support its conclusion. However, its view is directly contrary to the cases referred to above in which it has been held that extrinsic fraud is required in order to state a claim upon which relief can be granted in an independent action for relief from a judgment. Rule 60(b)(3) explicitly states that it does not matter whether the fraud which is the basis for the Motion for New Trial was extrinsic or intrinsic, but no such statement is included in the first savings clause.

In view of the Opinion by the Court of Appeals for the Third Circuit in this case and in *Publicker*, and the con-

flict between these Opinions and the Opinions in cases decided by other Courts of Appeals, it is appropriate for this Court to grant a Writ of Certiorari to resolve this issue.

CONCLUSION

For the reasons set forth above, the cross petitioner respectfully requests that this Court grant the Cross Petition for Writ of Certiorari.

Respectfully submitted,

WILLIAM T. CAMPBELL, JR.
Counsel of Record
ROBERT B. MULHERN, JR.
SWARTZ, CAMPBELL & DETWEILER
1700 Land Title Building
100 South Broad Street
Philadelphia, PA 19110
(215) 564-5190

Attorneys for Cross-Petitioner
Rival Manufacturing Company